Mustakim bin Chek Man v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–97 OF 2005
ZALEHA ZAHARI, HASAN LAH AND JEFFREY TAN JJCA
23 SEPTEMBER 2009

Criminal Law — Dangerous drugs — Trafficking — Appeal — Whether trafficking proved — Whether information admitted as evidence under s 27 of the Evidence Act 1950 inadmissible — Uncertainty as to what appellant actually meant — Whether actual words clearly established — Whether alleged information related distinctly to fact discovered — Whether s 27 could be invoked — Whether appellant in actual physical custody or control of proscribed drugs — Whether exclusive possession of flat proved — Whether possession proved

Evidence — Documentary evidence — Statement — Appellant's purported oral statements before discovery of drugs recorded by police on piece of paper — Uncertainty as to whether recorded words spoken by appellant before discovery of drugs — Whether inadmissible evidence may be admissible by reason of defence's failure to object

Evidence — Information leading to fact discovered — Admissibility of statement — Whether information admitted as evidence under s 27 of the Evidence Act 1950 inadmissible evidence — Uncertainty as to what appellant actually meant — Whether actual words clearly established — Whether alleged information related distinctly to fact discovered — Whether s 27 could be invoked

The appellant was stopped in the vicinity of Flat Putra Ria, Jalan Bangsar by SP4 (Chief Inspector Benedickson) and SP5 (Chief Inspector Azizan). At the car park, SP5 read the caution under s 37A of the Dangerous Drugs Act 1952 ('the DDA') to the appellant and then questioned the appellant. The appellant claimed to live at No 90-05-02, Flat Putra Ria ('flat') with his sister (SP9) and her husband (SP10). SP5 testified that 'Saya juga ada tanya kepada OKT sama ada menyimpan apa-apa barang salah, lalu OKT menjawab ada'. The appellant then led the police party to the flat and opened the grille door. From Room E2, the appellant took out a 'Microsoft Office 97' bag containing drugs and handed it to SP5. The appellant then led the police party to the guest hall where he took out a red plastic packet containing drugs from a drawer. SP9 and SP10 were in Ipoh on the material date. The

appellant was charged with trafficking in 2,056.3g of cannabis, an offence punishable under s 39B(2) of the DDA. SP5 testified that he recorded the oral statements on a piece of paper (exh P29) without any objection by the defence. The learned trial judge admitted the appellant's oral statements under s 27 of the Evidence Act 1950. The appellant was accordingly convicted and hence this appeal by the appellant.

Held, allowing the appeal; acquitting and discharging the appellant:

(1) The confessional content in P29 must be discarded. As for the rest of P29, there was uncertainty as to the actual words that were spoken by the appellant at the car park. P29 was recorded at the car park. Hence, P29 could only have been the record of the appellant's alleged oral statements at the car park and not when he was in the flat (see para 10).

(2) SP5 claimed to have asked the appellant whether he had any incriminating articles (barang salah) and the appellant answered 'ada', which was not an affirmative answer by the appellant that he had cannabis. There was no evidence that the appellant had said anything else after the answer 'ada'. But the account in P29 was that SP5 asked 'Ada apa-apa barang salah yang kamu simpan?' and the appellant answered 'Ada 2 kg ganja', and that SP5 asked 'Di mana kamu simpan?' and the appellant answered 'Dalam almari, di bilik dalam rumah saya'. Therefore, what was actually said by the appellant at the car park was not clearly established (see paras 10–11).

(3) Even if it were true that the alleged information was 'Dalam almari, di bilik dalam rumah saya', it had not led to the discovery of a fact. The evidence was that from room E2 the appellant took out a 'Microsoft Office 97' bag, and from a display cupboard in the hall the appellant took out a red plastic packet. But there was no evidence that any of the drug exhibits were recovered from a cupboard in a room — 'Dalam almari, di bilik dalam rumah saya'. The alleged information had not caused the discovery of the drug exhibits. Since the actual words of the appellant were not clearly established, and the alleged information in any case did not relate distinctly to the fact discovered, then s 27 could not consequently be invoked (see para 12).

(4) Although the admission of P29 was not objected by the defence, inadmissible evidence does not become admissible by reason of failure to object (see para 13); *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 referred.

(5) The appellant was not in actual physical custody or control of the proscribed drugs. Exclusive possession of the flat was not proved, for the flat was occupied not by the appellant alone. Without proof of exclusive

possession of the flat, there was no case of possession of the red plastic packet from the display cupboard in the hall. Exclusive possession of room E2 was also not proved (see paras 14–15).

[Bahasa Malaysia summary

Perayu ditahan di kawasan Flat Putra Ria, Jalan Bangsar oleh SP4 (Cif Inspektor Benedickson dan SP5 (Cif Inspektor Azizan). Di tempat pakir kereta, SP5 membaca amaran di bawah s 37A Akta Dadah Berbahaya 1952 ('ADB') kepada perayu dan kemudian menyoal perayu. Perayu menyatakan bahawa dia tinggal di No 90-05-02, Flat Putra Ria ('flat') bersama kakaknya (SP9) dan suaminya (SP10). SP5 memberi keterangan bahawa 'Saya juga ada tanya kepada OKT sama ada menyimpan apa-apa barang salah, lalu OKT menjawab ada'. Perayu kemudiannya membawa kumpulan polis tersebut ke flatnya dan membuka pintu gril. Dari bilik E2, perayu mengeluarkan beg 'Microsoft Office 97' yang mengandungi dadah dan menyerahkan kepada SP5. Perayu kemudiannya membawa kumpulan polis tersebut ke ruang tamu dan mengeluarkan sebungkus plastik merah yang mengandungi dadah dari sebuah laci. SP9 dan SP10 berada di Ipoh ketika itu. Perayu dituduh dengan tuduhan mengedar 2,056.3g kanabis, satu kesalahan yang boleh dihukum di bawah s 39B(2) ADB. SP5 memberi keterangan bahawa dia mencatatkan pernyataan lisan tersebut atas sekeping kertas (eksh P29) tanpa sebarang bantahan daripada pembelaan. Hakim bicara yang bijaksana menerima pernyataan lisan perayu di bawah s 27 Akta Keterangan 1950. Perayu disabitkan dan justeru rayuan ini oleh perayu.

Diputuskan, membenarkan rayuan:

(1) Isi kandungan pengakuan dalam P29 hendaklah diketepikan. Bagi isi kandungan P29 yang lain-lainnya, terdapat kesangsian dalam kata-kata sebenar yang diucapkan perayu di pakir kereta tersebut. P29 dicatatkan di tempat pakir kereta tersebut. Maka, P29 merupakan catatan pernyataan lisan perayu yang dikatakan di tempat pakir kereta dan bukannya semasa dia di flat tersebut (lihat perenggan 9).

(2) SP5 mendakwa bahawa dia bertanyakan perayu sama ada dia memiliki apa-apa barang salah dan perayu telah menjawab 'ada', yang mana bukanlah jawapan yang pasti daripada perayu bahawa dia memiliki kanabis tersebut. Tiada keterangan bahawa perayu telah berkata apa-apa selepas menjawab 'ada'. Tetapi catitan dalam P29 adalah bahawa SP5 bertanya 'Ada apa-apa barang salah yang kamu simpan?' dan perayu menjawab 'Ada 2 kg ganja', dan bahawa SP5 bertanya 'Di mana kamu simpan?' dan perayu menjawab 'Dalam almari, di bilik dalam rumah saya'. Oleh itu, apa sebenarnya yang diucapkan oleh perayu di tempat pakir kereta tidak jelas dibuktikan (lihat perenggan 10–11).

(3) Walaupun jika benar bahawa maklumat yang dikatakan adalah 'Dalam almari, di bilik dalam rumah saya', maklumat tersebut tidak membawa kepada penemuan fakta. Keterangan adalah daripada bilik E2 di mana perayu mengeluarkan beg 'Microsoft Office 97', dan dari almari hiasan di ruang tamu di mana perayu mengeluarkan sebungkus plastik merah. Tetapi tiada keterangan bahawa apa-apa dadah yang diekshibitkan dijumpai dari sebuah almari di dalam bilik — 'Dalam almari, di bilik dalam rumah saya'. Maklumat yang dikatakan itu tidak menyebabkan penemuan dadah yang diekshibitkan. Memandangkan kata-kata sebenar perayu tidak jelas dibuktikan, dan maklumat yang dikatakan itu tidak langsung berkaitan dengan fakta yang ditemui, maka s 27 tidak terpakai (lihat perenggan 12).

(4) Walaupun pengakuan dalam P29 tidak dibantah oleh pembelaan, keterangan tak boleh terima tidak menjadi bolehterima atas alasan kegagalan membantah (lihat perenggan 13); *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 dirujuk.

(5) Perayu tidak memiliki atau mengawal dadah berbahaya tersebut. Pemilikan eksklusif flat tersebut tidak dibuktikan, kerana flat tersebut tidak hanya didiami perayu. Tanpa bukti pemilikan eksklusif ke atas flat tersebut, tiada kes pemilikan sebungkus beg plastik merah dari almari hiasan di ruang tamu. Pemilikan eksklusif bilik E2 juga tidak dibuktikan (lihat perenggan 14–15).]

Notes

For cases on admissibility of statement, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1799–1804.

For cases on documentary evidence generally, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1090–1274.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Chan King Yu v PP [2009] 1 MLJ 457, FC (refd)
Choo Chang Teik & Anor v PP [1991] 3 MLJ 423, SC (redf)
Goh Beng Seng v Dol bin Dollah [1970] 2 MLJ 95, HC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Hamiron bin Mat Udin & 2 Ors v PP [1948] MLJ 50, HC (refd)
Hasamuddin bin Talena v PP [2002] 2 MLJ 408, CA (refd)
Ooi Lean Chai v PP [1991] 2 MLJ 552; [1991] 2 CLJ 1304, SC (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137; [1992] 2 SCR 1, SC (refd)
PP v Toh Ah Keat [1977] 2 MLJ 87, HC (refd)
Sandra Margaret Birch v PP [1978] 1 MLJ 72, HC (refd)

Wai Chan Leong v PP [1989] 3 MLJ 356, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37A, 39B(2)
Evidence Act 1950 s 27

Gurbachan Singh (Bachan & Kartar) for the appellant.
Suzana bt Atan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Jeffrey Tan JCA (delivering the judgment of the court):

[1] The amended charge against the appellant was that he, at 9pm on 21 January 2001 in house No 90–05–02, Flat Putra Ria, Jalan Bangsar, in the district of Brickfields in the Federal Territory of Kuala Lumpur, committed the act of trafficking in a dangerous drug, to wit 2,056.3g of cannabis, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA') with death.

[2] At the close of the prosecution case, the learned trial judge held that a prima facie case had been made out. The appellant was ordered to enter upon his defence. At the end of the entire case, the learned trial judge held that there was no doubt as to guilt, and convicted the appellant. Against that decision, the appellant appealed.

[3] The facts of the case could be summarised as follows. On the night of 21 January 2001, police were out on crime prevention duties in the vicinity of Flat Putra Ria, Jalan Bangsar. There, SP4 (Chief Inspector Benedickson Avina ak Jekes) arrested the appellant. SP4 handed the appellant to SP5 (Chief Inspector R Azizan Ibrahim). Also there, at the car park, SP5 first read the caution under s 37A of the Dangerous Drugs Act 1952 to the appellant, and then questioned the appellant. SP5 asked the appellant for his address. The appellant gave his address as 90–05–02, Flat Putra Ria ('flat'). The appellant informed SP5 that his sister ('SP9') and her husband ('SP10') also lived in the flat. The appellant surrendered two keys to SP5. SP5 asked the appellant whether he had any incriminating articles. The appellant answered in the affirmative. 'Saya juga ada tanya kepada OKT samada menyimpan apa-apa barang salah, lalu OKT menjawab ada' (see p 21 of the notes of proceedings). The appellant then led the police party to the flat. The appellant opened the grille door with one of the keys that he had earlier handed to SP5. SP5 and police party together with the appellant in handcuffs entered the flat. From Room E2, the appellant took out a 'Microsoft Office 97' bag and handed it to SP5 — 'Selepas dipandu arah oleh OKT yang dalam

keadaan bergari, ke dalam bilik tidur itu OKT telah mengambil satu beg hitam jenama Microsoft Office 97, lalu OKT serah kepada saya dengan disaksikan polis-polis yang hadir' (see p 21 of the notes of proceedings). That bag contained a compressed block of cannabis and two clear plastic packets. The appellant then led the police party to the guest hall. There, the appellant took out a red plastic packet from a drawer of the display cupboard in the hall. In that red plastic packet was a newspaper package. SP5 again read the s 37A caution to the appellant. SP5 asked the appellant about the contents of that newspaper package. Incidentally, all evidence of the oral statements of the appellant after the second caution, that is, when the appellant was in the flat, was withdrawn by the prosecution (see p 66 of the notes of proceedings).

[4] The prosecution also adduced evidence from SP9 that SP9 and SP10 also lived in the flat, that the appellant had his clothes in room E2, that guests of the family and friends of the appellant had stayed in that room and in another unoccupied room in the flat, and that SP9 and SP10 were in Ipoh on the material date, and from SP8 (Chief Inspector Mohd Slpiyang) that he heard the appellant saying to SP5 at the car park that there were 2kg of cannabis in the flat.

[5] In relation to those drug exhibits, a government chemist ('SP3' — Nazaruddin bin Mohamed) testified that the compressed block and two clear plastic packets from the Microsoft Office 97 bag and the newspaper package contained a total of 2,056.3g of cannabis.

[6] The above summary would not be complete without a further word on the all important oral statements of the appellant at the car park. SP5 testified that he recorded those oral statements on a piece of paper. That piece of paper was admitted as exhibit P29, apparently, without any objection by the defence. In effect, P29 would substantiate the fact of the alleged oral statements of the appellant.

[7] The learned trial judge admitted the aforesaid oral statements of the appellant under s 27 of the Evidence Act 1950 (see pp 66 and 68 of the notes of proceedings). But ' … for s 27 … to apply, the information must be such as has caused the discovery of a fact. In other words the fact must be the consequence and the information the cause of its discovery … the information must relate distinctly to the fact discovered' (*Wai Chan Leong v Pubic Prosecutor* [1989] 3 MLJ 356). ' … in order for the section to apply there must be evidence of the information upon which the fact was discovered' (*Evidence, Practice & Procedure* (2nd Ed) by Augustine Paul at p 258). ' … the first step which must be taken before s 27 can be invoked at all must be proof of some fact discovered as a result of the information given

by the accused' (*Hamiron bin Mat Udin & 2 Ors v Public Prosecutor* [1948] MLJ 50 at p 51 per Murray-Aynsley; see also *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137; [1992] 2 SCR 1, where it was held that emphasis is placed on the fact discovered and not on the information, for the fact discovered confirms the truth of the information).

[8] 'Section 27 is not intended to let in a confession generally and not one word more of the information which the accused supplied should be given in evidence that is strictly necessary to show how the fact which was discovered is connected with accused so as in itself to be a relevant fact against him' (*Krishnan v Public Prosecutor* [1987] 1 MLJ 292 at p 295, per Wan Sulaiman SCJ). Consequently, courts must guard against the danger of the abuse of s 27.

[9] In *Hasamuddin bin Talena v Public Prosecutor* [2002] 2 MLJ 408, Gopal Sri Ram JCA, as he then was, said as follows:

> Approximations are not permitted. In other words, the exact words spoken by an accused have to be proved. An illustration of that proposition may be found in *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137; [1992] 1 CLJ 39; [1992] 1 CLJ 265 (Rep), where Abdul Hamid Omar LP reminded us of the need for vigilance, 'to ensure the credibility of evidence by the police personnel in respect of this section (that is, s 27) which is so vulnerable to abuse. The rationale for the rule adverted to a moment ago appears in the judgment of Syed Agil Barakbah J (as he then was) in *Sandra Margaret Birch v Public Prosecutor* [1978] 1 MLJ 72. This is what he said:
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> > Information leading to the discovery must relate distinctly to the object so recovered and nothing more. Only so much of such information is admissible. Where such information is held to be admissible, the action of the accused which directly leads to such discovery, in this case the act of the appellant in approaching the green bag and opening it, is of little value and ought to be treated with caution as it is prejudicial to the accused. Further, there was no indication one way or the other what had caused the appellant to lead the police there. Whether her intention was to confess her guilt or to indicate Mohd Desa's guilt still remain uncertain. To my mind, since more than one inference has arisen, the inference in favour of the defence ought to be accepted. Since nothing more than the information given by an accused is admissible, it follows that the information must be exact and recorded in the language or words used by the accused. The strictness of the rule in the application appears sufficiently from the following passage in *Sarkar on Evidence* (14th Ed) at p 492:
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> > > Statements made by accused to police officers which are or may be provable under s 27 should be clearly and carefully recorded. They should be recorded

in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased (In *Re Athappa Goundan* AIR 1937 Mad 618; *Re Ramamurthy* AIR 1941 M 290; *Naresh v R* 46 CWN 180; *Public Prosecutor v Pasala* AIR 1945 Mad 2021; *Public Prosecutor v Venkoba* [1937] MWN 73; *Chenna v King Emperor* AIR 1940 Mad 710; *Gaya v State* AIR 1957 All 459; *Nathuv State* AIR 1958 All 46). No judge should allow one word more to be deposed to by the police than it is absolutely necessary to show how the fact discovered is connected with the accused.

[10] 'Section 27 … deals with a very special type of statement which even if self-incriminatory is nonetheless admissible under that section provided that the conditions prescribed are strictly complied with' (*Public Prosecutor v Toh Ah Keat* [1977] 2 MLJ 87 per Hashim Yeop A Sani (as he then was). And P29 would not pass the stringent conditions for admission. First of all, the confessional content in P29 must be discarded. As for the rest of P29, there was uncertainty as to the actual words that were spoken by the appellant at the car park. It should be noted that P29 was recorded at the car park (see p 68 of the notes of procedure). Hence, P29 could only have been the record of the alleged oral statements of the appellant at the car park and not when he was in the flat. It was the testimony of SP5 that he asked the appellant whether he had any incriminating articles (barang salah) and the appellant answered 'ada' (see pp 21 and 27 of the notes of procedure). SP5 agreed that his question was without any specific reference to cannabis, and that 'ada' was not any affirmative answer by the appellant that he had cannabis (see p 27 of the notes of procedure). There was no evidence from SP5 that the appellant had said anything else after the answer 'ada' (see p 21 of the notes of procedure). Immediately after the answer 'ada', the police party with the appellant in tow proceeded to the flat (see p 21 of the notes of procedure). But the account in P29 was very different and less kind to the appellant. The account in P29 was that SP5 asked 'Ada apa-apa barang salah yang kamu simpan?' and the appellant answered 'Ada 2kg ganja', and that SP5 asked 'Di mana kamu simpan?' and the appellant answered 'Dalam almari, di bilik dalam rumah saya'.

[11] SP5, who was recalled by the prosecution some five months after he had testified, clarified that he had forgotten to say that the appellant answered 'Ada 2kg ganja', and that he asked 'Di mana kamu simpan?' and the appellant answered 'Dalam almari, di bilik dalam rumah saya' (see p 69 of the notes of procedure). But that clarification by SP5 was less than satisfactory, for it was wholly inconsistent with his earlier testimony that 'ada' was not any

affirmative answer by the appellant that he had cannabis (see p 27 of the notes of procedure). Suffice it to say that what was actually said by the appellant at the car park was not clearly established.

[12] But even if it were true that the alleged information was 'Dalam almari, di bilik dalam rumah saya', it had not led to the discovery of a fact. The evidence was that from room E2 the appellant took out a 'Microsoft Office 97' bag, and from a display cupboard in the hall the appellant took out a red plastic packet. But there was no evidence that any of the drug exhibits were recovered from a cupboard in a room — 'Dalam almari, di bilik dalam rumah saya'. The alleged information had not caused the discovery of the drug exhibits. Since the actual words of the appellant were not clearly established, and the alleged information in any case did not relate distinctly to the fact discovered, then s 27 could not consequently be invoked.

[13] The learned trial judge made it a point to stress that the admission of P29 was not objected by the defence (see pp 99 and 108 of the notes of procedure). But inadmissible evidence 'does not become admissible by reason of failure to object' (*Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 per Edgar Joseph Jr FCJ and cited by the Federal Court in *Chan King Yu v Public Prosecutor* [2009] 1 MLJ 457. 'It is the duty of the court to disallow all inadmissible evidence even though no objection is taken to its admissibility. Inadmissible evidence remains inadmissible. It cannot be rendered admissible by failure of counsel to object to it' (*Goh Beng Seng v Dol bin Dollah* [1970] 2 MLJ 95 per Sharma J). 'Any admission of inadmissible evidence, even with consent or by waiver of the accused was wrongful and such inadmissible evidence remained inadmissible evidence, the effect of which was open to any court to assess' (*Ooi Lean Chai v Public Prosecutor* [1991] 2 MLJ 552; [1991] 2 CLJ 1304 per Mohammed Azmi SCJ). And since the alleged information could not be admitted, then the evidence of the actions of the appellant in taking out the Microsoft bag and the red plastic packet were of little value (see *Sandra Margaret Birch v Public Prosecutor* [1978] 1 MLJ 72, cited with approval in *Hasamuddin bin Talena v Public Prosecutor*).

[14] How would the prosecution case stand without exh P29? The appellant was arrested outside the flat while the proscribed drugs were found inside a bag from a bedroom and inside a red plastic packet from a drawer of a display cupboard in the hall. Unquestionably, the appellant was not in actual physical custody or control of the proscribed drugs. Given so, to prove possession of the proscribed drugs, the prosecution had to prove that the

A appellant had exclusive possession of the flat and or bedroom. But exclusive possession of the flat was not proved, for the flat was occupied not by the appellant alone. Yes, it could be argued that SP9 and SP10 were away in Ipoh at the time. But then again, it could also be argued that the appellant was also not in the flat at the same time in question. Without proof of exclusive B possession of the flat, there was simply no case of possession of the red plastic packet from the display cupboard in the hall.

[15] Exclusive possession of room E2 was also not proved. The evidence from SP5 was that the Microsoft bag was taken from room E2 (see p 31 of C the notes of procedure). But it was not proved that room E2 was the room of the appellant. The evidence from SP9 was that room E, not room E2, was the room of the appellant (see p 46 of the notes of procedure). According to SP9, room E2 was a guest room (see p 46 of the notes of procedure) that was not locked (see p 48 of the notes of procedure) and had been used by guests D of the family and friends of the appellant. According to SP10, both rooms E and E2 were guests rooms (see p 51 of the notes of procedure). That is not to say though that SP9 and SP10 were entirely hostile to the prosecution. SP9 testified that the clothes of the appellant were kept in room E2. SP10 testified that the appellant used (tumpang) room E2 (see p 51 of the notes of E procedure). But that was all that the prosecution had against the appellant. To that, perhaps it could be said that the appellant had knowledge of the drugs, but 'mere knowledge … is not sufficient to establish possession' (see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137). Still, all things considered, it did not add up to the primary fact — the exclusive possession of room E2 — for F to infer that the appellant had possession of the articles in room E2. At the very most, the evidence of possession of the Microsoft bag and its contents was by inference alone. 'But in a capital offence, evidence by inference alone is not enough to support a conviction without the element of control' (*Choo Chang Teik & Anor v Public Prosecutor* [1991] 3 MLJ 423).

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[16] The alleged offence was committed post-amending Act A979 (effective 31 January 1997) but pre-Criminal Procedure Code (Amendment) Act 2006 (effective 6 March 2006). The test of a prima facie case then was H whether there was sufficient evidence to convict, if the accused should elect to remain silent (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301). Given the state of the total evidence and the doubt as to the information evidence in particular, had the appellant remained silent, there was insufficient evidence to convict. Hence, defence should not have been called.

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[17] It was for those reasons that we, on 30 July 2009, had allowed the appeal, set aside the conviction and sentence, and acquitted and discharged the appellant.

Appeal allowed; appellant acquitted and discharged.

Reported by Kanesh Sundrum